IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 26/09/2002

Coram

The Honourable Mr.Justice M. KARPAGAVINAYAGAM

CRIMINAL APPEAL No.1231 of 2002

Sarala ..Appellant

-Vs-

State by Inspector of Police,
Nilakottai Police Station,
Dindigul District.
(Crime No.586/2000) ..Respondent

Criminal Appeal against the judgment dated 25.7.2002 in S.C.No.95 of 2001 on the file of the Principal District and Sessions Judge, Dindigul.

!For Appellant : Mr. V. Kathiravan

^For Respondent : Mr. O. Srinath, G.A.

:J U D G M E N T

Sarala, the appellant was tried for the offences under Sections 364 and 302 I.P.C. for having kidnapped the child by name Subash Pandi, aged about 4 years, from his parents house at Madurai and took him to Anaipatti village and pushed him into the well, thereby caused his death.

2. After conclusion of trial, the trial Court found the accused guilty for both the offences, namely Sections 364 and 302 I.P.C. by the judgment dated 25.7.2002. Challenging the same, the appellant has filed this appeal before this Court.

3. When the appeal came up for admission on 22.8.2002, this Court asked the counsel as to how the appeal against conviction under Section 302 I.P.C. could be brought before the single Judge instead of Division Bench. At that point of time, the learned counsel would submit that the trial Court though convicted the appellant for the offences under Sections 364 and 302 I.P.C., she was only sentenced to undergo R.I. for seven years for the offence under Section 302 I.P.C. and R.I. for five years and to pay a fine of Rs.1,000/- for the offence under Section 364 I.P.C. and hence, the Office posted the appeal before the single Judge.

4. On verification, it is noticed that the minimum sentence for Section 302 I.P.C. is life imprisonment. Therefore, this Court by the order dated 22.8.2002, while admitting the appeal, called for the remarks from the trial Court as to why the punishment of imprisonment for seven years was imposed for the offence under Section 302 I.P.C., while there is a minimum imprisonment of life is prescribed. Then,the matter was adjourned to 2.9.2002.

5. On 2.9.2002, the remarks were not received by this Court. Therefore, the Registry was directed to send a reminder to the trial Court to send the remarks. Ultimately, the remarks were sent by the learned Principal District and Sessions Judge, Dindigul on 5.9.2002 admitting the mistake.

6. It is stated in the remarks that the learned Judge passed the sentence of seven years R.I. on the accused without any intention or ulterior motive, but he was moved by the pathetic situation in which the accused, a helpless young girl was placed with disappointments, humiliation and hatred from her near and dear ones at the young age. He would also state in the remarks that during the course of trial, she got married and she gave birth to a child and throughout the trial, the accused was present in the Court with a small baby which was found clinging to her and therefore, out of sympathy, he awarded the sentence of seven years. He would further state that the mistake committed by him unintentionally and therefore, he may be pardoned for the mistake committed. In concluding paragraph, he would further state that he will be more careful in future, while discharging his duties as District and Sessions Judge to the satisfaction of the Hon'ble High Court.

7. On receipt of these remarks, this Court originally thought to issue notice for enhancement of sentence. But, the learned counsel for the appellant would submit and request that even though he filed a bail petition pending appeal, he would not press the same, and this Court may take up the main appeal for final disposal after calling for the records from the lower Court, instead of issuing notice for enhancement as there is no material at all for convicting the appellant and as such, she has got every chance for success in the appeal. This Court was further informed that the appellant/accused is in jail along with a small baby in her arms.

8. During the arguments of the counsel for the appellant on pointing out several portions of the judgment impugned, he would also show that the material on the basis of which the conviction was based by the trial Court is not admissible and even assuming that the said material can be relied upon, those materials would not be sufficient to hold the appellant guilty for the offences under Sections 364 and 302 I.P.C.

9. On going through the judgment, this Court felt that the matter could be taken up for final disposal, instead of granting bail pending appeal and instead of issuing notice for enhancement.

10. The learned Government Advocate appearing for the State also would submit that he would be ready for final disposal on the date fixed by this Court. So, on 9.9.2002, this Court directed the Registry to call for the

records from the lower Court and posted the matter on 16.9.2002. Accordingly, the records have reached this Court on 11.9.2002. The learned counsel for the appellant has filed the entire typed-set.

11. In the meantime, this Court wanted to enquire P.W.2 and P.W.3, the parents of the deceased. Therefore, they were also summoned. On 16.9.2002, both P.Ws.2 and 3 were present. They would state that if the accused being her sister realised her mistake, they would even excuse her. Then, the matter was posted for final disposal on 24.9.2002 .

12. The Government Advocate received the typed sets from the counsel for the appellant and verified with the original records and he said that the deposition and the exhibits contained in the typed sets II and III have been correctly typed.

13. Before dealing with the merits of the case, it should be pointed out that the trial Court has committed an illegality in imposing seven years imprisonment when the minimum sentence of life imprisonment is prescribed. This Court on previous occasions had to go through the judgments rendered by this particular Sessions Judge which were always found to be good. But, this Court has come across for the first time to find that the serious mistake is committed by the Principal Sessions Judge. Therefore, it would be appropriate to pardon him. However, it must be pointed out that sympathy on the accused does not provide powers for the Court to impose sentence less than the minimum, that too in a case of grave offence. The curious thing is that in the remarks, the learned Judge would state that he knows that minimum sentence is life imprisonment, but however, out of sympathy, he did commit the mistake by not awarding minimum sentence of life imprisonment. The mistake committed unknowingly can be condoned. But in this case, even as per the remarks, the learned Judge would admit that the mistake was committed knowingly. However, in view of the past records of the particular Judge, this Court has to necessarily take the lenient view with reference to the mistake committed by him. Accordingly, he is pardoned and warned that he should not commit such a mistake in future.

14. Let us now come to the facts of the case, which are as follows:
"(a) P.W.2 Chella Pandi is the elder brother of the accused Sarala. P.W.3 Kalyalvizhi is the wife of P.W.2. They are the residents of Madurai Ram Nagar New Jail Road. The deceased boy Subash Pandi was the son of P.Ws.2 and 3.

(b) Sarala, the accused, unmarried young girl, after death of her mother, was living with P.Ws.2 and 3 along with their two sons. The accused Sarala was very much worried, since her marriage was postponed due to several reasons. Sarala was under the impression that P.Ws.2 and 3 were not taking proper steps to get her married. Due to this, quarrel broke out between the accused Sarala and her sister-in-law P.W.3/Kayalvizhi.

(c) Recently, the accused went to her sister's house at Vilampatti to attend on her, since she gave birth to a child. After a month's stay, on 3.10.2000, she came back to the house of P.Ws.2 and 3. P.W.3 scolded her for

her returning to their house instead of remaining at Vilampatti itself.

(d) Aggrieved over this, she wanted to take a revenge. She planned to take the son of P.W.3 and pushed him into the well. Accordingly, when the son came from the school on 4.10.2000 afternoon, she took him and came to Anaipatti village and on the same evening, she pushed him into the well situated near the temple. Consequently, the deceased Subash Pandi drowned and died.

(e) In the meantime, P.Ws.2 and 3 were searching for the whereabouts of Subash Pandi. They came to know that their son was taken by the accused.

(f) On 5.10.2000 at about 10.00 p.m., she came to the house of P.W.1 Village Administrative Officer of Anaipatti village and gave an extra judicial confession that she murdered her brother's son by pushing him into the well on 4.10.2000 in order to take revenge upon the family of her brother. The statement was reduced into writing by P.W.1. This is Ex.P-1.

(g) Thereafter, the accused was taken to the Nilakottai Police Station. She again gave a confession to the police. In pursuance of the confession, P.W.10, the Inspector of Police after registration of the case in Crime No.586/2000 for the offence under Section 302 I.P.C., took her to the well and recovered the body of the child. Then, he prepared the observation mahazar Ex.P10. He also seized the Rexene school bag M.O.1 and other items M.O.2 series. He conducted inquest. Ex.P11 is the inquest report.

(h) P.W.7 Doctor conducted post-mortem on the dead body of the deceased and gave opinion in Ex.P-7, the post-mortem report stating that the deceased boy aged about 4 years died of drowning.

(i) Then, P.W.10, the Inspector of Police, on completion of the investigation, filed the charge sheet against the accused for the offences under Sections 364 and 302 I.P.C."

15. During the course of trial, P.Ws.1 to 10 were examined, Exs.P1 to P11 were filed and M.Os.1 to 7 were marked.

16. When the accused was questioned under Section 313 Cr.P.C., she stated that a false case has been foisted against her.

17. On appreciation of the evidence on record, the trial Court ultimately convicted the accused under Sections 364 and 302 I.P.C.

18. The learned counsel for the appellant would submit the following contentions:
"Ex.P1, the extra-judicial confession made by the accused before P. w.1 cannot be relied upon, as there is no corroboration to the contents of the said extra-judicial confession. Admittedly, there is no eye witness. There is no material placed by the prosecution that the accused was staying along with P.Ws.2 and 3 on 3.12.2000 and 4.12.2000 and she only kidnapped the deceased from the house of P.Ws.2 and 3. Though the case of the prosecution

is that the Auto Driver took the boy from the school and dropped him in the house of P.Ws.2 and 3, the said Auto Driver was not examined. If actually, the accused had take the deceased from the house as soon as he returned from the school, it is not necessary for her to take him along with the school bag etc., which was recovered from the scene place. In the case of circumstantial evidence, the prosecution should show various links to form the complete chain to point out that the accused alone had committed the offence. In this case, there are no links to form the complete chain. As such, the accused is entitled to be acquitted."

19. The Government Advocate would make an attempt to justify the reasonings given by the trial Court for imposing conviction for both the offences under Sections 364 and 302 I.P.C.

20. I have carefully considered the submissions made on either side and also gone through the typed set and the records called for from the lower Court.

21. Admittedly, there is no eye witness in this case. The whole case is based upon the circumstantial evidence. It is well settled, as laid down in the decisions reported in BALWINDER SINGH VS. STATE OF PUNJAB (1996 S.C.C. (CRL.) 59) and SUDAMA PANDEY VS. STATE OF BIHAR (2002 (1) S.C.C. 679) that the circumstances from which the conclusion of guilt is to be drawn should be full proof and those circumstances must be conclusive in nature to connect the accused with the crime. All the links in the chain of events must be established beyond reasonable doubt. The established circumstances should be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In a case based on circumstantial evidence, the Court has to be on its guard to avoid the danger of allowing suspicion to take the place of legal proof and has to be watchful to avoid the danger of being swayed by emotional consideration, howsoever strong they may be to take the place of proof.

22. In the light of the above principles, we can now analyse the case of the prosecution in the present case.

23. The prosecution in this case relies upon three pieces of circumstantial evidence to show that the accused alone had committed the offence: (1) extra-judicial confession made by the accused to P.W.1 V. A.O.; (2) the accused was residing along with P.Ws.2 and 3 on 3.12.200 0 and took the deceased boy from their house on 4.12.2000 after he returned from the school; (3) the body of the deceased and the school bag were recovered on the confession of the accused.

24. Let us discuss the above circumstances one by one.

25. The first piece of evidence is extra-judicial confession. It is settled law that as laid down by the Supreme Court in STATE OF PUNJAB VS. BHAJAN SINGH (AIR 1975 SC 258) and in 1996 S.C.C. (Crl.) 59 (cited supra) that the extra-judicial confession by its very nature is rather the weak type of evidence and requires appreciation with the great deal of care and caution.

Where the extra-judicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it looses its importance. The Courts generally look for independent reliable corroboration before placing any reliance upon extra- judicial confession. Bearing on these principles, if we look at the contents of extra judicial confession, this Court is unable to place any reliance on Ex.P1, the extra-judicial confession made by the accused to P.W.1, the V.A.O.

26. According to the prosecution, on 4.12.2000, the accused took the deceased who returned from the school at about 12.30 p.m. and got the bus to Sholavandhan and from there, she got another bus and came to Anaipatti and pushed him in the well situated near Hanumar Temple at about 5.00 p.m. She then directly went to Vilampatti. From there, she went to Madurai Bethaniapuram where her another sister Mehala stayed. To them she stated that she left the child with her grandmother at Chockalingapuram. Thereafter, she went to Thiruparangundram Temple and slept there. Ultimately, on 5.12.2000, she came to Anaipatti at about 10.00 p.m., and met V.A.O. P.W.1 and gave a confession thinking that he would help her.

27. The reading of Ex.P-1 would reveal that even though she went to Vilampatti after the commission of the offences where her sister Vanitha was staying and from there, she went to Bethaniapuram where her another sister Mehala was staying, she did not choose to tell anything about the offence committed by her to them. On the other hand, it is stated in the statement that on 5.10.2000 night at about 10.00 p.m., she came to the V.A.O's office at Anaipatti and met P.W.1 and gave the statement.

28. Admittedly, as deposed by P.W.1, P.W.1, V.A.O. is a stranger to her. P.W.1 also would state that he never met her earlier. There is no detail either in the evidence of P.W.1 or in Ex.P1 extrajudicial confession as to why she chose to come to V.A.O's office, that too at 10.00 p.m. to give confession, that too to an utter stranger. Even though P.W.1 as a dutiful public servant recorded the statement of the accused, he did not choose to go to the well which is nearby situated to verify whether the contents of the statement is true.

29. Furthermore, V.A.O. himself would admit that he had not sent copies of the statement to the superior officers and he is not keeping the copy of the same in his office and he had not even affixed any office seal in Ex.P-1 statement. When the accused who has got one sister Vanitha at Vilampatti, another sister Kavitha at Thoppur and another sister Mehala at Bethaniapuram, why she did not prefer to give such confession to them even though they are kith and kin? This question has no answer.

30. As a matter of fact, the accused helped her sister Vanitha at Vilampatti in attending on her as she has recently given birth to a child. After the occurrence that had taken place on 4.12.2000 at about 5.00 p.m., there is no reason as to why she did not come to her sister's house at Vilampatti, although she stated in her statement Ex.P-1 that she came to

Vilampatti. Similarly, she went to another sister's house at Bethaniapuram, but she did not choose to mention about this to her. According to her, she went to Thiruparangundram temple and slept there and thereafter, on 5.12.2000 night about 10.00 p.m., she came in a Van to Anaipatti to meet V.A.O. where the well is situated.

31. Therefore, the extra-judicial confession alleged to have been made by the accused to P.W.1 cannot be said to be genuine and voluntary and as such, no reliance can be placed either on the evidence of P. W.1 or on Ex.P1, the extra-judicial confession.

32. Regarding the second piece of circumstantial evidence, it is stated by the prosecution that the accused only took the deceased from the house of P.Ws.2 and 3 on 4.12.2000. Admittedly, P.Ws.2 and 3 were not available in the house when the deceased was taken by the accused. P.W.6 Sarojini, the School Teacher would admit that the boy came on 4.12.2000 and attended the school and left the school in the Auto at about 12.00 noon. Even though it was specifically stated by P.W.6 that the boy was taken in an Autorikshaw, the police did not choose to examine the Auto Driver to find out as to whether the deceased was dropped in the house of P.W.2 and P.W.3.

33. Furthermore, P.W.3 would state that when she came back to the house, she was told by her father-in-law that the deceased was taken by the accused. P.W.2 also would state that his father informed him that both son and Sarala/accused would come back soon. But, unfortunately, the father who is stated to have witnessed the deceased being taken by the accused has not been examined as he is no more. Therefore, non-examination of the material witnesses, namely, the father of P.W.2 and the Autoriksha Driver would make it clear that the important link in the chain is missing.

34. The prosecution was not able to establish through P.Ws.2 and 3 conclusively that the accused was staying along with them on 3.12.2000 and the son was taken only by the accused on 4.12.2000 afternoon. Though they would refer to the quarrel between the accused and P.W.3 on 3.12.2000 on her coming back from Vilampatti, it would not be sufficient to hold that the deceased was kidnapped only by the accused.

35. Furthermore, it is noticed that the school bag and other items contained in it were recovered near the well. If she wanted to kidnap for the purpose of murdering him, what is the necessity for her to take him along with the school bag? This would indicate that the boy did not return to the house of P.Ws.2 and 3 in the afternoon of 4.12.2000. If he had returned to the house, he would have left the school bag and other items in their house itself and then gone out of the place. So in this respect also, this Court has to entertain a suspicion over the prosecution case.

36. The third piece of evidence is confession and recovery of the body. This also has not been established by the prosecution. According to prosecution, the body was recovered only when the accused pointed out the well in the presence of P.W.10, the Inspector of Police and P.W.1, V.A.O. P.W.1 did not state that the well was pointed out by the accused and thereupon, the

body was recovered. On the other hand, he would state that when he along with others went to the well, he found that the body was already lying near the well. When suggestion had been put to him that the body was removed at about 4.00 p.m. on 5.12.2000 itself, he denied the knowledge about it. However, the evidence of P.W.1 does not show that the body was recovered only after they went to the well. In the observation mahazar Ex.P3 also, it is not mentioned that the body was recovered only after the police came to the spot. This would indicate that only after the body was recovered from the well, the information must have been received by the police and then, the statement of the accused must have been obtained through P.W.1.

37. Thus, the above things would show that there is no evidence to connect the accused with the offences with which she is convicted. Virtually, this is a case of no evidence. Consequently, she is entitled to be acquitted.

38. In fine, the appeal is allowed. The conviction and sentence imposed upon the appellant/accused by the trial Court are set aside and she is directed to be set at liberty forthwith. The fine amount, if paid, is directed to be refunded.

26-09-2002
Index: yes
Internet: Yes
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M. KARPAGAVINAYAGAM, J.
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To
1) The Principal District and Sessions Judge, Dindigul.
2) The Public Prosecutor, High Court, Madras.

Judgment
in
Crl.A. No.1231 of 2002

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